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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 273

UNITED NEW YORK and NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

vs.

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of WALTER JOSEPH HALECKI, deceased, and ANNA HALECKI, Administratrix of the Estate of WALTER JOSEPH HALECKI, deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Counter-Statement of Facts

This case has been tried before a judge and jury three times in the United States District Court. It has been argued once in the United States Supreme Court, with applications for *certiorari* having been made on two occasions. The present petition is the third application to this court. The case was tried the third time on the theory of negligence against the defendant shipowner for death re-

sulting from carbon tetrachloride poisoning of the deceased, an electrician, employed by a subcontractor to clean the vessel's generators in the confined spaces of the engine room with carbon tetrachloride.

The first time the case was tried before Judge WEINFELD and a jury, the jury rendered a verdict of $67,500.00 in favor of the plaintiff. The case was submitted to the jury on the grounds of negligence and unseaworthiness. On appeal the judgment was affirmed with Chief Judge LOMBARD dissenting on the ground that the claim for unseaworthiness should not have been submitted to the jury. *Halecki* v. *United New York & New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958) (P15a). Judge LOMBARD did not dissent insofar as negligence was concerned, *Certiorari* was granted by the United States Supreme Court. *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki*, 357 U. S. 903, 78 S. Ct. 1149, 2 L. Ed. 2d 1154 (1958). A closely divided court reversed and remanded for a new trial on the issue of negligence alone. 358 U. S. 613, 79 S. Ct. 517, 5 L. Ed. 2d 372 (1959) (P3a).

This court divided only on whether the issue of unseaworthiness should have been submitted to the jury. The entire court agreed that the issue of negligence properly had been submitted to the jury.

At no point during the course of the first appeal was any attack made by any judge on the verdict of the jury in so far as the cause of action based on negligence was concerned. All judges agreed that if the verdict had been based on negligence alone, it would have stood. Judge WEINFELD in the first trial had charged in terms very similar to those charged by Judge MCGOHEY at the third trial (P1a).

Judge LEARNED HAND, whose opinion was not challenged with respect to the issue of negligence, declared that the deceased was a "business guest". He stated (P19a):

"As to the claim based on negligence, so far as the defendants mean to argue that the engine-room equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict.—"

Judge HAND went further and stated that the defendant was under a duty "to exercise" reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities (P19a)." Mr. Justice STEWART stated (P8a):

"As to the claim based upon negligence, for which the New Jersey Wrongful Dealth Act clearly gives a right of action, *we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.'* The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use." (Italics ours)

At the second trial in the District Court, the jury brought in a verdict for the defendant. Plaintiff appealed and this court reversed on the basis of the court's charge to the jury. *Halecki v. United New York & New Jersey, etc.* 282 F. 2d 137 (2 Cir. 1960) (D3a). Judge MOORE commented (D11a):

"* * *. A careful study of the charge leaves a definite impression that the jury was told that lia-

bility was dependent almost entirely upon control. Under a less restrictive charge the same jury might well have found that the ship owner had fulfilled its 'duty of exercising reasonable care for the safety of the decedent, but the plaintiff *was entitled* to have the jury reach its conclusion upon an instruction that *emphasized the defendant's awareness of the dangerous substance to be employed and of the capacity of the ventilating equipment in the engine room* so that it could determine 'whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use.' * * *"

Following this decision, a petition for certiorari was denied. *United New York & New Jersey Sandy Hook Pilots Association* v. *Halecki*, 364 U. S. 941, 81 S. Ct. 459, 5 L. Ed. 2d 372 (1961). The case was retried a third time. This time the jury returned a verdict for $70,000.00 (D67a). The defendant appealed again from the judgment rendered.

It is important to note that the ship's crew also worked on the vessel at the time it was undergoing repairs at Rodermond. Captain Goetz, defendant's marine superintendent, testified *for the first* time at the third trial. He stated (D46a):

"Q. Were there various types of work to be done while the boat was in the repair yard? A. Yes, many types.

Q. By whom were the various types of work done? A. The shipyard.

Q. You are referring now to Rodermond? A. Yes,

Q. At the same time did the crew of the pilot boat have some work to do? A. Yes."

Walter Thompson, a witness for defendant testified that the ship's engineers were repairing the engines while the

vessel was at Rodermond (P67a). With reference to the work done on the vessel while it was at Rodermond, Mr. Doidge, a K&S employee, testified (P35a):

> "Q. Were the ship's officers there too? A. Yes.
> What were they doing. Tell me, from what you observed from Monday to Friday, what the ship's officers and crew were doing? A. Most of the work, the work involving me, was in the engine room, and the engineer and crew were down there removing heads from the diesel engines."

He also testified (P36a):

> "Q. Did you see the ship's crew doing any other work about the vessel, other than what you just described? A. I wasn't particularly interested in what they were doing. I know they were there working around me all the time.
> Q. Was the vessel in the water or on a drydock? A. In the water."

With reference to the role of the defendant's chief engineer *who has never testified*, he stated (P40a):

> "Q. Did you discuss with him the other work you had been doing prior to Saturday? A. On the specifications, yes.
> Q. What was the purpose of these discussions? A. Actually he is the boss in the engine room on the ship and any work that has to be done has got to be O.K.'d by the chief engineer and we have to consult with him all the time.
>
> • • •
>
> Q. With reference to the time, the day before when you were making these preparations, was the chief engineer present while you were making preparations on the Friday before September 29, 1951? A. Oh, yes.

Q. When was he present? A. He was present all day.

• • •

Q. Did you discuss with him the method or manner of the use of the carbon tetrachloride and the work to be done? A. No. He didn't ask and I didn't tell him what was going on.

• • •

Q. What did he say? A. He said as long as everybody was out of there, it was OK, as far as he was concerned.

Q. Did you discuss with him the method and manner in which you were going to use the carbon tetrachloride? A. No.

Q. Did he say anything about it at all? A. No.

• • •

Q. On behalf of the vessel, who was in charge of the repairs being done on that vessel during the week when you started, Monday? A. In the case of the engine room, we always went under the supervision of the chief engineer. If we are up on deck doing overhead work, then we went to the first mate or the captain."

Gerald J. Horvitz, testified as an expert, having been produced by plaintiff. He stated (P49a):

"Q. Considering the fact that this took place during the year 1951, could you tell us whether or not carbon tetrachloride was known in industry and in the business world to be a dangerous substance and that the use of it was dangerous? A. It was.

Q. Were there substitutes available in 1951? A. Yes.

Mr. Doidge testified that something other than carbon tetrachloride would have been used if it hadn't been specified by defendant (P37a). Mr. Horvitz also stated (P51a):

"Q. Considering the year of 1951 and based upon your experience that you have described with shipping and with the American Bureau of Shipping I think you said, and based upon your knowledge of the dangers of carbon tetrachloride; and the knowledge in the industry at that time, 1951, what was the usual custom and practice where carbon tetrachloride was provided to be used for the cleaning of generators at that time, in 1951?

The Court: Aboard ships, you mean?

Q. Aboard ships. A. Well, the same rule applies to carbon tetrachloride that applies to any other material giving off noxious fumes. In other words, the owner of the vessel, when he gives out his work order or contract for repairs will stipulate and state or require in that contract that a certified chemist be called in to go over and investigate and make sure that when that particular noxious material, carbon tetrachloride in this case, is used, that adequate means be taken to provide for the safety of personnel using that material.

Now, then the next thing that when those recommendations are made by the inspector, and that man of course is properly qualified and licensed by the American Bureau of Shipping, then it is the duty of the ship-owner to see that those regulations are carried out.

The Court: Mr. Horvitz, you were not asked about the duty and I will instruct the jury to disregard that expression, 'it is the duty.' You were asked what is the usual custom and practice.

The Witness: Yes. That is the practice and calls for an inspection. The next step is that proper personnel employed by the owner sees to it that those instructions are carried out and proper means made

A further point is when work is in progress, a chemist is called in to check to see whether the conditions are safe."

Mr. Horvitz, stated on cross-examination (P53a):

"Q. In your experience, Mr. Horvitz, was this work done by the shipowner or by the repair yard? A. Well, the shipowner in many cases stipulates in his contract that certain safety precautions are to be made. In many shipyards a certified chemist is employed. Maybe more than one."

Mr. Finkenaur, the expert produced by defendant, testified (P70a):

"Q. When it came to the use of carbon tetrachloride in the confines of the engine room, you do recognize that it would be necessary to have auxiliary equipment for ventilating of the vessel? A. That is correct.

Q. That was absolutely essential? A. Yes, sir.

Q. You know that? A. That is right.

Q. And the shipowner knows that or should know it?

Mr. Mahoney: Objection.

The Court: The witness testified to the need for auxiliary equipment in the ship's engine room and stated that the use was generally known in the marine trade.

The Witness: Yes, sir."

Captain Goetz conceded that even though he had been on board the vessel prior to the day the spraying was to be done he made no inquiry concerning the manner in which the work was to be done (P72a). He also confirmed the fact that he knew of the dangerous nature of the work specified by the defendant to be done in the engine room (P71a).

The plaintiff tendered the testimony of Stanley Tenusiak, a chief engineer, as an expert to establish as a matter of fact that the decedent was doing work traditionally done by seamen at the time of his death. This was the same testimony given at the second trial (P46a). The court below refused to submit the issue to a jury (P47a), and dismissed the unseaworthiness count on the ground that the rulings of this court on the second appeal controlled the District Court (D67a). Plaintiff had cross-appealed in order to preserve his right to proceed on the issue of unseaworthiness in the event there are any further proceedings. If, as plaintiff contends, the judgment below should be affirmed, this issue is moot. The defendant now seeks a writ of certiorari from the judgment of the Court of Appeals, 302 F. 2d 840 (2 Cir. 1962), which affirmed the judgment rendered on the third trial.

Counter-Questions Presented

Whether or not the defendant having directed that a dangerous chemical be used in the confined engine room of its vessel, owed to the deceased a duty to exercise reasonable care to provide him with a reasonably safe place to work?

Whether or not the duty of the defendant existed regardless of any concurrent duty owed by the shipyard or the employer of the deceased?

Whether or not the defendant had a duty to exercise reasonable care under the circumstances to ascertain the method or manner of use of a poisonous gas in the confined spaces of the engine room of its vessel where it directed that such gas be used?

Whether or not in view of the factual evidence submitted to the effect that the deceased was doing seaman's work the case should not have been submitted to the jury on unseaworthiness as well?

ARGUMENT

There is no conflict or inconsistency in the opinions of the Court of Appeals for the Second Circuit rendered after the decision of the United States Supreme Court in this case.

Judge MEDINA writing for the court in the last appeal (third appeal) in the United States Court of Appeals specifically answered petitioner's argument that the instructions of the trial judge (at the third trial) were inconsistent with the opinion of this court and with the opinion of Judge MOORE writing for the Court of Appeals after the second appeal. Judge MEDINA stated (Pet. 6a):

> *"Nor do we find anything to the contrary in the exposition of the measure of the shipowners' duty to Halecki in the opinion of the Court, written by our brother Moore, on the prior appeal.* His comment that 'the jury might find that the owner had done everything possible to assure safety,' was upon the implied supposition that there was proof of 'assurance by the subcontractor that its own additional portable ventilators and gas masks were sufficient to prevent injury.' Even upon this hypothesis, the opinion continues and states that the jury might 'equally con-

clude that the owner should have checked the equipment brought on board at least as to capacity and location for ventilating purposes,' and thus have concluded as matter of fact that the shipowners had not exercised reasonable care to provide a reasonably safe place to work. *In other words, just as charged by Judge McGohey, the question of reasonable care was one for the jury. Accordingly, we hold that the instructions as given were precisely those required by the Supreme Court and our Court in this case, and by the law generally applicable to a situation where a shipowner turns over to a subcontractor the performance of an operation inherently dangerous to human safety.*" (Italics ours.)

The alleged discrepancy or inconsistency does not exist. This case which has been reviewed and expounded upon numerous times should not be brought again before this court for a review of facts and principles of law already extensively reviewed and established. *Cf. The Wisconsin Electric Company* v. *The Dunmore Company*, 282 U. S. 813, 51 S. Ct. 214, 75 L. Ed. 728 (1931).

The trial court at the third trial very carefully charged in accordance with the opinion of this court and the opinions in the Court of Appeals (D57a). The court in its charge stated several times that the standard was that of "reasonable care" and a "reasonably prudent person"; that the duty involved a "reasonably safe place to work" and that the defendant had a duty to "take reasonable steps to be sure insofar as they could" that the manner and method employed was "reasonably safe under all the circumstances" (D58a; D59a; D60a). Among other things the court stated (D60a):

"That really is the main issue on liability in this case, as to the defendant's liability. Because *if you*

find that the defendant did not breach any duty it owed Halecki, if you find that under all of the circumstances the defendant was not negligent, *if you find that it did discharge its duty to take reasonable steps to make this place reasonably safe under the circumstances, then you must bring in a verdict for the defendant.*" (Italics ours.)

The court also specifically charged * * * "They didn't insure his safety in there." * * * (D62a). Reviewing the entire charge, the trial court fairly set forth the law applicable to this case in the light of the facts established at the trial.

See, also, *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14, 19 (3 Cir. 1957), aff'd 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959); *Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. 2d 277, 279 (2 Cir. 1954), aff'd 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); *Guerrini* v. *United States*, 167 F. 2d 352, 355 (2 Cir. 1948); *Anderson* v. *Lorentzen*, 160 F. 2d 173, 174 (2 Cir. 1947); *Puleo* v. *H. E. Moss*, 159 F. 2d 842, 845 (2 Cir. 1947); *Vanderlin* v. *Lorentzen*, 139 F. 2d 995, 996 (2 Cir. 1947).

On the basis of the defendant's own evidence it was established that the defendant did nothing "to assure safety" and neither asked or received any assurance by the independent contractor concerning the safety measures taken for the performance of the dangerous operation ordered by the defendant in the confined spaces of its vessel. Captain Goetz, defendant's marine superintendent, testified (D41a). He had not appeared at either of the two prior trials (P71a). He stated (D43a):

"The Court: In other words, the specifications provided that the cleaning of the generators should be done by the carbon tetrachloride?

The Witness: That is right.

Q. Now which member of the Association, if any, had provided or specified that carbon tetrachloride was to be used?' A. The chief engineer.

Q. The name please? A. Carl Ebling."

On cross-examination Captain Goetz stated that the chief engineer was still alive although retired (P71a; P66a). The chief engineer, who had the most intimate knowledge of the arrangements made, if any, has never testified. Captain Goetz admitted that in 1951 he knew that carbon tetrachloride was a dangerous substance and that cleaning generators in an engine room was a dangerous operation (P71a). He testified that (P72a):

"Q. No conversation concerning ventilating equipment to use carbon tetrachloride to clean generators on the next day, Saturday? A. No, sir.

Q. You had no discussion with anybody? A. None at all.

Q. Did you make any inquiries from anyone how this work was to be done? Yes or no. A. No.

Q. Were you familiar in a general way, at that time with the use of carbon tetrachloride? A. We had used it for several years.

Q. Prior to that time? A. Prior to this time."

Captain Goetz conceded that he knew that carbon tetrachloride "was a dangerous substance" at the time the work was ordered (P71a). He also conceded that he knew that the cleaning work in the engine room was a "dangerous operation" (P71a). He did not talk to anyone about the equipment to be used (P72a). He made no inquiries concerning the methods to be used in doing the work (P72a).

The defendant in its brief and in support of its requests to charge repeats cases which have been reviewed and distinguished by Judge Moore in the second appeal in the Court of Appeals (D12a):

"* * * However, as in practically all these cases, slight factual differences call for slightly different treatment. Referring to its own decision in this case (*United Pilots Ass'n* v. *Halecki*, 358 U. S. 613 (1959)), the Court in *West* pointed out the distinguishing element here, namely, 'In that case the shipowner directed the use of carbon tetrachloride in the confined spaces of the engine room' (p. 124) * * *."

The defendant in its brief and in support of its requests to charge depends upon *Byars* v. *Moore McCormack Lines*, 155 F. 2d 587 (2 Cir. 1946); *Filipek* v. *Moore McCormack Lines*, 258 F. 2d 734 (2 Cir. 1958); *Lyons* v. *Empressa*, 273 F. 2d 317 (2 Cir. 1959); *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (2 Cir. 1953). Each of these cases was distinguished by Judge MOORE in the second opinion of the Court of Appeals (D11a to D13a) and they were not even discussed in the third opinion of the Court of Appeals.

The defendant alleges error in the portion of the charge where the court stated that the duty the defendant owed to plaintiff "could not be delegated to any one else" (D58a). The defendant alleged that this is contrary to the ruling of Judge MOORE in the second appeal. However Judge MOORE's remarks were directed to a suggested charge of the plaintiff which was rejected by the trial court at the second trial. Judge MOORE quoted the requested charge (D9a):

"* * * 'the defendant shipowner's absolute and nondelegable duty to supply a vessel and appliances adequate and sufficient for the work to be performed imposes liability on the defendant for such conditions regardless of any absence of control by the defendant over the vessel or appliances, and regardless of whether or not the defendant had notice of the inadequacy of the appliances'. * * *"

A mere reading of the rejected charge shows that it was not in any way similar to the charge of the trial court at the third trial. The charge discussed in the above quotation speaks of an absolute and non-delegable duty imposed regardless of notice, etc. It is essentially a charge based on unseaworthiness. It makes no mention of reasonable care and a reasonably safe place to work, etc. This is entirely different from charging that the defendant couldn't delegate its own duty, which the court defined, to anyone else and that the defendant's duty continued to exist even though the shipyard or plaintiff's employer also had duties with respect to this matter (D58a). The remarks of the trial court at the third trial was fully consistent with the appellate opinions in this case and with established law.

The defendant seeks another review of this case by this court on the ground that there is an alleged inconsistency in the opinion of the Court of Appeals following the second trial and the opinion of the Court of Appeals following the third trial. The three judges of the Court of Appeals who heard the last appeal did not find any conflict between their own opinion and that of the other members of the Court who heard the second appeal. On the contrary the court found that the charge of the trial court on the third trial was in accord with the decisions of this Court and the Court of Appeals. Not only does the allegation of alleged conflict in the decisions of the Court of Appeals for the Second Circuit lack substance, but the alleged conflict with the decisions of other circuits is not established either. This case should now be permitted to come to a terminal point. If for any reason *certiorari* is granted, however, petitioner respectfully requests that this court also consider whether the issue of unseaworthiness should have been submitted to the jury in view of the factual evidence offered at the second and third trials of this action to prove that the deceased at the time of his death was doing work traditionally performed by seamen.

CONCLUSION

The law involved in this case has been exhaustively reviewed and set forth in an opinion of this court and in three opinions of the Court of Appeals. There is no special or important reason for this court to exercise its judicial discretion to review the matter further.

For the foregoing reasons, it is respectfully urged that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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